IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 110.

MARGARET HETZEL, TO THE USE OF THEODORE BACON, TRUSTEE, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

STATEMENT.

1.

In this suit the plaintiff claims damages for alleged obstruction and injury to vacant land in Washington city, resulting from the unlawful occupation of "D" street northwest by a siding or track of the defendant company.

The declaration was filed April 24, 1876, seeking to recover damages for the three years next preceding.

At the trial of this cause at the October term of 1894, in the supreme court of the District of Columbia, the jury,

by the direction of Chief Justice Bingham, returned a verdict for the plaintiff for one cent damages, and judgment accordingly entered. This judgment was subsequently reviewed by the Court of Appeals of the District of Columbia on the plaintiff's appeal and approved. To review the judgment of the Court of Appeals approving the judgment of the supreme court of the District of Columbia, the case has been brought to this Court by writ of error. Prior to the trial involved in this appeal there had been several trials of the case, in two of which verdicts had been rendered for the plaintiff, but these verdicts were in turn set aside by the general term, and the several opinions of that court may be hereafter referred to.

2.

From the record it appears that for many years prior to December 28, 1871, the plaintiff, Margaret Hetzel, and Andrew Wylie were owners as tenants in common in fee-simple of the whole of original lot numbered one (1), in square numbered six hundred and thirty (630), excepting that part of said lot at the northern side or corner thereof, fronting on North Capitol street thirty-five feet and a fraction, by the depth of one hundred and twenty feet, then owned by Wylie in severalty. All of original lot 1 was bounded by North Capitol and D streets. On December 28, 1871, the plaintiff and Wylie, according to a plat of subdivision by them prepared and recorded, made partition of said property, whereby sublots Nos. 1, 2, 3, 4, and 5 were transferred to the plaintiff, and sublots Nos. 6, 7, 8, 9, 10, and 11 went to Andrew Wylie. The plat of subdivision is referred to in the deed of partition, and with reference thereto the title to the several sublots are conveyed. In this recorded subdivision of original lot numbered 1 several alleys were laid out, and in the deed of partition the parties thereto mutually

covenanted with each other that all such alleys should be private and under the control of all the owners of property touching thereon.

In 1872, before the bringing of this suit, the plaintiff purchased the lots that had been allotted to Wylie in the partition, and also the lot on the northern corner, which had been held by Wylie in severalty. None of the lots purchased from Wylie and only lots 1, 2, and 3 of the entire Wylie-Hetzel subdivision abutted on D street (Rec., p. 10), and all the lots were vacant and wholly unimproved. In 1861, long prior to the purchase by the plaintiff of the Wylie lots, the defendant company laid a side track (the obstruction complained of) from its main stem on North Capitol street along D street to New Jersey avenue, and used said track until 1877, when it was removed. On the north or opposite side of D street from the property in question is located the defendant's depot.

POINTS AND ARGUMENTS.

The Court of Appeals of the District of Columbia affirmed the judgment of the trial court upon the following grounds:

First. Because there was a variance between the declaration and proof.

The real cause of action, as stated in the declaration, is that the plaintiff was before and ever since April 24, 1873, seized in fee-simple of a certain lot of ground on the corner of D and North Capitol streets, Washington, D. C., being lot numbered 1 in square numbered six hundred and thirty, in said city, and that there has been a public street and highway for all persons, &c., and which was used by the plaintiff and others as of right for access to and egress from said lot; yet the defendant, well knowing the premises, but

contriving and wrongfully intending to injure the plaintiff and to incommode and annoy her, together with the public, in the use and enjoyment of said D street, and more particularly to prevent the plaintiff and others from enjoying that portion of said D street upon which the plaintiff's lot abuts, from obtaining access to and exit from said lot of ground, and with intent wrongfully to diminish the value of said lot of ground, &c., on the 24th of April, 1873, and at divers other times since obstructed said D street by placing thereon freight cars in large numbers, &c., and suffered them to remain there an unreasonable time, &c., and thereby prevented the plaintiff, as well as the public, from passing and repassing on said D street, and more particularly from using that portion of D street on which plaintiff's lot abuts, to gain access to or exit from said lot of ground, and still obstructs said street, &c., and thereby materially and seriously diminished the value of said land and prevented the plaintiff from selling the same, though she tried so to do, to the special damage of the plaintiff.

The declaration claims damages for all of original lot 1. The proof shows that prior to 1873 original lot 1 had been subdivided into lots from 1 to 11 and lot known as "of one;" that Judge Wylie, who was the exclusive owner of lot "of one," acquired in partition lots from 6 to 11, inclusive, and afterwards and before the period covered by the suit sold them, together with lot "of one," to the plaintiff; that of these lots, according to the subdivision, only lots 1, 2, and 3 abutted or touched upon D street.

The Court of Appeals upon the question of variance says (Rec., p. 19):

"The plaintiff, at the trial, offered a series of prayers for instruction to the jury. They were all refused by the court, and properly refused. They were all founded upon the assumption of injury to the plaintiff in respect of all the lots contained in the subdivision of the original lot 1; and, moreover, they did not propound any such proper and exact

rule for estimating damages as the court, in this class of wrongs, would have been justified in giving to the jury. But, apart from all this, the evidence upon which the prayers were founded showed a state of case quite different from that set out in the declaration. It is not upon the evidence alone, but upon the pleadings and the evidence applicable to the pleadings, that the plaintiff can in any case recover, and the one must consist with the other. The declaration here, as we have seen, proceeds as for an injury to the entire original lot, without any reference or respect to the subdivision of that lot, and that the lots made of the subdivision are separate and distinct parcels of ground, fully recognized and provided for by law, and entirely ignores the fact that the plaintiff never was in reality seized in severalty of the original lot 1 as it existed before the subdivision and as declared upon in the declaration.

"The proof produced by the defendant, showing how lot 1 was originally held and how it had been subdivided and partitioned, and how title to all the lots was acquired by the plaintiff and their relation to each other and the streets upon which they abut, entirely negatives and refutes the case presented in the declaration and the right of the plaintiff to recover thereon."

And again, upon the effect of the subdivision, the Court of Appeals says (Rec., pp. 17 and 18):

"The obstruction of D street complained of is admitted to have been without legal authority, and the obstruction was of D street northwest, opposite the front of lots 1 and 2 and along the south side of lot 3 of the subdivision, but as to the other lots in the subdivision the freight cars causing the obstruction complained of in D street offered no obstruction whatever to their access. The lots fronting on North Capitol street, except lot 3 siding on D street, all being open and vacant, it is difficult to perceive in what way the obstruction on D street could affect them. Lots 1, 2, and 3 may have been affected; but a party who owns and has a particular parcel of land affected by the existence of a contiguous nuisance can-

not purchase other parcels of land not so affected in contemplation of law, and by adding the parcels together increase the amount of damages recoverable—at least not under the conditions existing in this case. The subdivision of the original lot made separate and distinct parcels or lots, and those allotted to Judge Wylie did not abut on D street, and the access to and exit from them were not affected by the obstruction on that street. The plaintiff, in respect to those lots, is not entitled to stand in a more favorable position than Judge Wylie could occupy if he had not sold the lots, and it is clear if Judge Wylie were still owner of the separate lots assigned to him in the partition, all fronting on North Capitol street, he would have no cause of action in respect of such lots for the obstruction in D street, such as that sued for in this case."

And what is said here by the Court of Appeals in regard to lots from 6 to 11, inclusive, taken by Wylie in partition, would apply with even greater force to lot "of one" which was held by Wylie in severalty.

Proprietors of Locks and Canals, 10 Cush., 388.

Second. Because, while the plaintiff claims damages in the declaration for being prevented from selling the entire original lot 1, the proof shows that the title to that considerable portion of said lot included in the alleyways of the subdivision was not and has never been in her.

The instruction of the trial court in this case was "that the testimony showed that the plaintiff offered her property for sale as a whole, and undertook to sell it as one lot; that the action was for damages for her not being able to sell lot one; that the testimony showed that even if she had received an offer for lot one she could not consummate the sale because she did not own the fee in the alleys."

This position is affirmed by the Court of Appeals (Rec., pp. 19 and 20), and by that court declared to be in har-

mony with the ruling of the general term of the supreme court of the District in several appeals in the course of this litigation. (Rec., p. 16.)

The titles to the alleys in the subdivision referred to, however regarded, whether we consider them as public or private alleys, was not in Mrs. Hetzel and could not form a part of the basis of recovery in a suit of this nature. They were recorded as District property, and therefore not assessed for taxes. By the deeds from Judge Wylie to Mrs. Hetzel the title to these did not pass to Mrs. Hetzel, and Mrs. Hetzel's interest in and control over them was no greater than that of a stranger. Certainly she had no such interest in this alleyway property as to form the basis of the speculation contemplated in this suit.

The Court of Appeals decided that these instructions were properly refused by the trial court, and among the several reasons for its conclusion stated "that these instructions did not propound any such proper and exact rule for estimating damages as the court, in this class of wrongs, would have been justified in giving to the jury." In the course of its opinion it says (Rec., p. 19):

"The evidence in the record before us is exceedingly meager. There is not a particle of evidence as to the salable value of the land, without reference to the existence of the nuisance complained of, or to what extent the existence of the nuisance would affect that value; nor is there any evidence of the rental value of the property without the presence of the nuisance, and to what extent the existence of the nuisance would affect such rental value. These facts were essential to be ascertained in order to furnish a basis for estimating the damages. In an action like the present the plaintiff must show actual damages sustained and not damages resting in conjecture or contemplation merely, and the recovery in the first instance is limited to the actual damages sustained by reason of the nuisance and its effect upon the rights and property of the plaintiff."

In the plaintiff's brief there are a number of cases cited to show that Mrs. Hetzel became the owner in fee of the alleys by the purchase of the adjacent lots. In the District of Columbia the fee in streets and alleyways is in the Government and not in the abutting owners. We do not think that the cases cited support that position or have any bearing or relevancy upon the question at issue here; nor do we think that the letter of Judge Selden (page 17 of Plaintiff's Brief) upon the question of damages has any bearing upon the issues here or will be considered as authority by this Court.

It is respectfully submitted that the judgment below should be affirmed.

G. E. HAMILTON,

M. J. COLBERT,

Attorneys for Defendant in Error.